Provisional

For participants only

14 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3430th meeting
Held at the Palais des Nations, Geneva, on Monday, 16 July 2018, at 10 a.m.

Contents

Protection of the environment in relation to armed conflicts (*continued*)

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.00 a.m.

Protection of the environment in relation to armed conflicts (agenda item 7) (*continued*) (A/CN.4/720)

The Chair invited the Commission to resume its consideration of the first report on protection of the environment in relation to armed conflicts (A/CN.4/720).

Mr. Zagaynov said that the Special Rapporteur's first report, with its thorough analysis of different aspects of the challenging topic, provided a good basis for fruitful discussion in the Commission, which was of particular importance given the opinions that had been expressed on the issue in the Sixth Committee.

He agreed that the principle that the Commission could not modify the law of armed conflict should be adhered to consistently. In that connection, he was not convinced that it was possible, at the present stage, to establish norms for protection of the environment in relation to armed conflicts, as some speakers had suggested. That would be an attempt to change international humanitarian law in the area. The standards of international law applicable in situations of armed conflict should be completely clear, and priority should be put on ensuring the safety of the civilian population; while protection of the environment was important, it should not be placed on the same level. If, for instance, a pilot had to bring a plane down in either a densely populated district or a nature reserve, it was clear which he or she would choose.

It should not be forgotten that the general scope of the topic must be limited to the framework of armed conflict. He did not fully understand the logic behind some of the draft principles already adopted relating to the period before an armed conflict; if more detail were not added, they would actually be about protection of the environment during peacetime. The matter had certainly been discussed previously, but he nevertheless wished to express his doubts on the issue, particularly as the Special Rapporteur was suggesting that those provisions would apply to the section on occupation.

Some of the wording, such as "areas of major environmental and cultural importance" or "protected zones", was very general in nature; the designation of such areas outside of wartime should not be a subject of consideration. In the context of armed conflict, demilitarized zones, hospitals and security zones would be considered as protected zones under international humanitarian law, as would unprotected towns and populated areas. It should be remembered that, when the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I) was being developed, the idea of extending that status to other areas or zones had not won the necessary support. If that were ignored, the Commission's work might not correspond fully to current international humanitarian law. He hoped that a general explanation of the relevant issues would be included in the commentary.

He agreed that it was not appropriate to provide a definition of occupation. As Mr. Murase and others had said, occupation could take different forms: short-term or decades long, accompanied by active military action or acts of terrorism, or peaceful and without bloodshed; there could be different practical consequences of occupation for the civilian population. Some of the situations that had been mentioned during the discussion were not situations of occupation and so did not belong to the topic under consideration. The Special Rapporteur had adopted the optimum approach, proposing general wording for principles that would be used for all the various types of occupation. Any more specific wording by type of occupation would not be feasible.

He supported the proposed structure of the analysis, including, as it did, sections on international humanitarian law, international human rights law and international

environmental law, on the understanding that those "peaceful" branches of international law were used to the extent that they did not contradict humanitarian law.

In respect of draft principle 19, he thought that the Drafting Committee should discuss the questions raised by Mr. Murase, Mr. Rajput, Mr. Hassouna, Sir Michael Wood, Mr. Cissé and others on the inclusion in paragraph 1 of a reference to maritime areas, and adjust the wording accordingly. He agreed with Mr. Murphy that paragraph 2, on respecting the legislation of the occupied State, should not be worded too strictly. It was unlikely that environmental protection had been an issue when the Regulations respecting the Laws and Customs of War on Land (the Hague Regulations) had been adopted.

On draft principle 20, although the current text did not reproduce wording that had been agreed in the past, it could form a good basis for discussion. While the text could certainly be improved on, he did not support Ms. Galvão Teles' suggestion of taking the exact wording used by the Institute of International Law, which mentioned the possibility of using natural resources of the occupied territory "to meet the essential needs of the population". If an occupation lasted for many years, he did not think it would be right to underline concern only about the population's basic needs, disregarding its other interests.

On draft principle 21, he agreed with the proposal made by Mr. Murphy and Mr. Rajput on the use of the wording "take all appropriate measures" or "exercise due diligence".

In respect of future work, he thought that it was logical to include an analysis of non-international armed conflict in the work on the current topic. It would also be interesting to include the actions of non-State armed groups. As Sir Michael Wood had noted, the Special Rapporteur and the Commission needed to return to using the terms "environment" and "natural environment" in the document. A brief analysis of that issue could be included in the next report. He was concerned that the questions about dispute resolution and compensation might "overload" the next report and the draft principles in general.

In conclusion, he thanked Ms. Lehto for the analysis and proposals and hoped that the topic would be concluded on its first reading in 2019. He supported the referral of the draft principles to the Drafting Committee.

Mr. Vázquez-Bermúdez said that he welcomed the Special Rapporteur's excellent first report, which would allow the Commission to make significant progress on the topic on the basis of its previous work under the guidance of her predecessor, Ms. Jacobsson. He agreed to a large extent with the analysis and proposals made by the Special Rapporteur.

As the Special Rapporteur recalled in her report, the Working Group that had been established the previous year to consider the way forward in relation to the topic had noted that substantial work had already been done on the topic and had underlined the need for its completion. The Working Group had further noted that, in addition to certain aspects of the draft principles, such as streamlining, terminology, filling gaps and overall structuring of the text, as well as completion of the draft commentaries, there were other areas that could be further addressed including, *inter alia*, issues of complementarity with other relevant branches of international law, such as international environmental law, protection of the environment in situations of occupation, issues of responsibility and liability, the responsibility of non-State actors and overall application of the draft principles to armed conflicts of a non-international character.

As noted by the Special Rapporteur, many States, including Greece, El Salvador, the Federated States of Micronesia, Portugal, Thailand, Malaysia, Romania and Trinidad and Tobago, had expressed support for the idea of considering the interplay between the law of

armed conflict and other branches of international law, in particular human rights law and international environmental law.

The report focused on the protection provided to the environment by international humanitarian law — or the law of armed conflict — in respect of occupation, including the Hague Regulations of 1907, the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I), and customary law. The report also addressed the complementarity of other relevant areas of international law in the context of occupation, such as international human rights law and international environmental law.

The three proposed draft principles on protection of the environment in situations of occupation were at a high level of abstraction and the accompanying commentaries would therefore be extremely important when adopted. The first report contained many useful points supporting and explaining the scope of the draft principles.

While situations of occupation were never desirable nor, still less, to be encouraged, the fact was that they occurred and often became prolonged, making it necessary for them to be regulated under international law. The norms of international law related to protection of the environment were thus of interest, both in terms of the occupied territory and of action taken in the occupied territory that could have an impact on the environment of other States or areas beyond national jurisdiction.

In respect of proposed draft principle 19, he supported the new wording put forward by the Special Rapporteur when presenting her report, which indicated that the occupying Power must take environmental consideration into account in the administration of the occupied territory, including in any adjacent maritime areas over which the territorial State was entitled to exercise sovereign rights. Without prejudice to any drafting changes that might be made, the specification contained in the second part of paragraph 1 was relevant in that, for the purposes of the environmental considerations to be taken into account in the administration of the occupied territory, it encompassed maritime areas, such as the exclusive economic zone and the continental platform, and, obviously, the living and non-living resources contained therein. In that regard, reference could be made to any maritime area over which the occupied territory was entitled to exercise jurisdiction.

He also agreed with paragraph 2, which was based mainly on the so-called conservationist principle, which set general limits on the competences of the occupying Power in the occupied territory.

Draft principle 19 (2) was appropriate in that it provided that the occupying State, unless absolutely prevented, should respect the environmental legislation of the occupied territory. The provision embodied the so-called conservationist principle, which set the general limits to the occupying State's competences in the occupied territory.

Proposed draft principle 19 was well substantiated in the Special Rapporteur's report, in particular by article 43 of the Hague Regulations, as interpreted in the current context, for instance, in terms of the essential interest of a State in protecting its environment, as recognized by the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, an essential interest which must be respected by the occupying Power as a temporary administrator. The Special Rapporteur's analysis of the complementarity in that respect of international human rights law, particularly the right to health, the right to food and the right to life, and a healthy environment, was also relevant.

It had been broadly recognized in international and regional jurisprudence that international human rights law continued to be applicable during armed conflict, including

in situations of occupation. Furthermore, the occupying Power was also bound by its own human rights obligations in occupied territory, including those under customary international law.

On the basis of those considerations, there should be added to the draft principle a reference to the obligation of the occupying Power to respect its obligations under international law, in addition to its obligation to respect national legislation.

He concurred with the use of the term "legislation" in paragraph 2 in that it was a general term that covered constitutional, legal and other norms in force in an occupied territory. He agreed with those members who had said that the term "occupying Power" should be used instead of "occupying State". Furthermore, as some members had said, the possibility that an international organization might, in certain circumstances, constitute an occupying authority should not be ruled out. The matter could be dealt with in the commentaries.

Draft principle 20 was based on the right to property, and in particular on the so-called "usufructuary rule", which was set out in article 55 of the Hague Regulations, as well as on other relevant and complementary rules and principles that had emerged following the adoption of those regulations. They included the principle of permanent sovereignty over natural resources and that of self-determination in relation to the exploitation of natural resources in territories under occupation.

The usufructuary rule had to be understood in terms of the concept of sustainable development, which underpinned various principles of international environmental law, such as the principle of intergenerational equity. As one of the dimensions of sustainable development, the sustainable use of natural resources incorporated the idea of striking a balance between the rate of the use of such resources and the benefits they provided to the population, including to future generations.

International law placed a number of limitations on occupying Powers in their role as temporary administrators of the natural resources of an occupied territory. As summarized by the International Law Institute, "the occupying power can only dispose of the resources of the occupied territory to the extent necessary for the current administration of the territory and to meet the essential needs of the population". The general prohibition of the destruction or seizure of property in the occupied territory, unless rendered absolutely necessary by military operations, was also important in the administration of natural resources and the protection of the environment.

For those reasons, it seemed necessary to expand draft principle 20 so that it covered more comprehensively the limitations imposed on the occupying Power's administration of the natural resources of an occupied territory. While he was not opposed to improvements along those lines being proposed in the Drafting Committee, any such proposals should retain the existing wording "shall administer natural resources", since the obligation set forth in the text provided that those resources were to be administered in a predetermined fashion, namely, by ensuring their sustainable use.

Draft principle 21 embodied the "no harm" or due diligence principle of international law. In her report, the Special Rapporteur provided sound arguments for the application of that principle in situations of occupation, including by means of citations from the International Court of Justice's advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, which indicated that "physical control of a territory and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States", and its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which the Court had indicated that States had a general obligation to ensure that activities within their jurisdiction and control respected the

environment of other States and of areas beyond national control. That principle had also been reiterated more recently in the Court's judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, paragraph 101 of which the Special Rapporteur had used as the basis for the wording of draft principle 21, which he endorsed. The phrase "shall use all the means at its disposal" in the draft principle allowed for flexibility in terms of taking existing circumstances into account.

He considered it appropriate for the draft principle to maintain the threshold of "significant damage" that was defined in the Commission's articles and commentaries thereto on prevention of transboundary harm from hazardous activities. In paragraph (4) of the commentary to draft article 2 of that project, the Commission had noted that: "It is to be understood that 'significant' is something more than 'detectable' but need not be at the level of 'serious' or 'substantial'."

The complementarity between the protection of human rights and the protection of the environment had also been recognized by the Inter-American Court of Human Rights. In its advisory opinion OC-23/17 concerning State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity of persons under the jurisdiction of the State, the Court had indicated that States had the obligation to prevent significant environmental harm both within and outside their territory. In order to meet that obligation, they had the obligation to regulate, supervise and monitor activities under their jurisdiction that could produce significant harm to the environment; carry out environmental impact studies where there was a risk of significant harm to the environment; establish a contingency plan providing for security measures and procedures to minimize the possibility of a major environmental accident; and mitigate any resulting significant damage to the environment. That advisory opinion might usefully be cited in the commentaries to the draft principles.

In conclusion, he supported the referral of the three draft principles to the Drafting Committee, taking into account the comments made in the plenary debate.

With regard to the future work on the topic, he endorsed the Special Rapporteur's proposals in paragraph 100 of her report. It would also be useful for the Special Rapporteur to analyse in her second report the complementarity of international environmental law and of international human rights law with international humanitarian law, also with respect to situations of armed conflict, in general, both international and non-international, and in the post-conflict phase, i.e. not only in relation to situations of occupation.

With a view to filling the gaps in the Commission's work on the topic, the Special Rapporteur should also consider in her second report the issue of the prohibition of the use of environmental modification techniques for military or any other hostile aims having widespread, long-lasting or severe effects as the means of destruction, damage or injury to another State, and propose a draft principle along those lines. That prohibition was directly related to the protection of the environment in relation to armed conflicts and was embodied in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (Convention on Environmental Modification). It was noteworthy that the previous Special Rapporteur had indicated in her second report (A/CN.4/685) that, among the most well-known provisions that were germane to the protection of the environment were those that were found in the Convention on Environmental Modification.

The Convention defined environmental modification techniques as any technique for changing, through the deliberate manipulation of natural processes, the dynamics, composition or structure of the Earth — including its biota, lithosphere, hydrosphere and atmosphere — or that of outer space. As to the phenomena that could be caused by such techniques, the following explanation was provided in the understandings regarding the

interpretation of the Convention that were drafted at the time of its adoption: "It is the understanding of the Committee that the following examples are illustrative of phenomena that could be caused by the use of environmental modification techniques as defined in article II of the Convention: earthquakes; tsunamis; an upset in the ecological balance of a region; changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer; and changes in the state of the ionosphere."

Through the Commission's work on another topic on its current agenda, namely that of the protection of the atmosphere, it had been made aware of recent technological advances in the area of geo-engineering that made it possible to bring about large-scale modifications of the atmosphere. With that in mind, the Commission had provisionally adopted draft guideline 7 (Intentional large-scale modification of the atmosphere), which read: "Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law."

In paragraph (2) of the commentary to draft guideline 7, the Commission had indicated that: "The term 'activities aimed at intentional large-scale modification of the atmosphere' is taken in part from the definition of 'environmental modification techniques' that appears in the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques." Given the potential for such advances to be used for hostile aims, it was important for one of the draft principles on the protection of the environment in relation to armed conflicts to reflect the prohibition of military or any other hostile use of environmental modification techniques.

Ms. Oral, congratulating the Special Rapporteur on her successful first report, said that the challenge faced by the Special Rapporteur and the Commission was having to operate within the limited area of existing treaty law which predated the modern development of international environmental law. The challenge became especially evident in the context of occupation, since the principal sources were the Hague Regulations of 1907, which had codified customary international law of the nineteenth century, slightly updated by the Fourth Geneva Convention, the main purpose of which had been to provide for more enhanced protection for the civilian population in the aftermath of the horrors of the Second World War, and, to some extent, Additional Protocol I. The world had changed immensely since the adoption of those instruments.

The Special Rapporteur had therefore faced some daunting challenges in devising principles to meet the needs of the twenty-first century. As highlighted in the first report, the law of occupation was a relatively undeveloped area that relied on indirect sources. A further challenge was that the Commission's work on the topic should not "modify the law of armed conflict". That left the Special Rapporteur little room for manoeuvre around the very complex and delicate topic of occupation. For that reason, the Special Rapporteur's legal skills in presenting an excellent analysis of the current state of the law of occupation and efforts to adopt those old rules to modern concepts of environmental protection, including use of the evolutive method of interpretation, were to be commended. If the Commission could not modify rules that had been adopted in a different century under very different living conditions, technological capacity and consumption patterns, it needed to be able to interpret those rules that allowed for such flexibility to meet current needs.

In that connection, the work of Michael Bothe, a very well-known expert on international humanitarian law, cited in the report, should be noted. He had identified, principally on the basis of article 43 of the Hague Regulations and the Fourth Geneva Convention, three principles of law of occupation, which included the duty of good governance of the occupying Power. Article 43 also imposed on the occupying Power the duty to restore and ensure public order and safety — or "civil life", as expressed in the French authentic text. She agreed with Bothe's explanation that the elements of the duty of

good governance meant that the occupying Power must conduct its administration of the occupied territory according to what was expected of the modern State. The Commission's ultimate aim was to provide principles that reflected rules of occupation for a modern, twenty-first century State in relation to protection of the environment.

The Special Rapporteur also explained in her report that, the general obligation of the occupying State, under article 43 of the Hague Regulations, was an obligation to ensure that the occupied population lived as normal a life as possible under the circumstances and that such a normal life had an obvious connection to the protection of the environment, which was widely recognized as one of the core functions of a modern State.

In that context, it was worth recalling that the International Court of Justice, as Mr. Hassouna had noted, had emphasized the importance of the protection of the environment, stating that the "environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn". Furthermore, the importance of the protection of the environment had been recognized by the Court in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* as an essential interest of the State, a point also noted by the Special Rapporteur. The Commission must therefore interpret the existing rules with that in mind.

As explained by the Special Rapporteur and highlighted by several colleagues, occupation could be peaceful and resemble a post-conflict period or it could be a situation of intense hostilities or resumption of armed conflict. The duration of occupation could be short or long. In other words, the situation of belligerent occupation was a variable situation.

On that point, several members of the Commission had underlined the importance of the matter of the duration of an occupation during armed conflict and its consequences for the obligation of the occupying Power in relation to protection of the environment. The longer the occupation, the more questions arose. Under article 43 of the Hague Regulations, during a short period of occupation, the occupying Power was obliged to restore and ensure public order and civil life, returning it to its pre-armed conflict state. That was reflected to some extent in draft principle 15 on the post-conflict situation and its reference to remedial measures. However, it might be asked whether, in the case of long-lasting situations of occupation, the occupying Power was obliged simply to maintain the *status quo ante* or to do more.

In paragraph 103 of her report, the Special Rapporteur, aware of the variability of the character of belligerent occupation, raised the question as to the relevance of the existing draft principles to situations of occupation and suggested that the relationship of certain already provisionally adopted draft principles with the law of occupation should be clarified, presumably in the commentaries. She herself would go further and supported Mr. Park's proposal to have a provision stating that the draft principles in Part Two and Part Three would apply *mutatis mutandis* in the situation of occupation.

A further question, raised by Mr. Petrič in relation to human rights law, was whether the occupying Power was obliged to apply its own environmental protection standards to the occupied territory if those standards were higher than the laws in force in the occupied State. It might be, for instance, that the occupied State had laws that resulted in harmful fisheries practices or was not party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. If the occupying Power had stricter regulations, it would be unfortunate if, in line with the rule laid out in article 43 of the Hague Regulations, the laws of the occupied State were simply respected; that point should be kept in mind when considering draft principle 19 (2).

The Special Rapporteur had addressed the protection of the environment under the law of occupation examining the applicability of property laws, international human rights

law and international environmental law. In respect of property law, article 55 of the Hague Regulations laid down the usufructuary rule, whereby the occupying Power was the usufructuary of public buildings, real estate, forests and agricultural estates belonging to the hostile State, and situated in the occupied country. Accordingly, the occupying Power must safeguard the capital of those properties and administer them in accordance with the rules of usufruct. The question was how the obligation to safeguard the capital of those cited properties translated into modern concepts of international environmental law based on broader notions of natural resources that included biological diversity, ecosystems and habitats. Article 55 listed specific natural resources not as natural resources *per se* but as exploitable natural resources with economic use and value. Could the rule of usufruct actually be made consonant with the modern and current concept of conservation and preservation? She believed that the Commission, through its work on the topic, could make an important contribution by providing a contemporary and modern understanding of article 55.

In paragraphs 90 to 92 of her report, the Special Rapporteur skilfully linked the concept of usufruct under article 55 to the more modern concept of sustainable use; that interpretation could be broadened to include a more general obligation of conservation of natural resources. The concept of preserving the capital and allowing the occupying Power to use only the fruit contained some elements of the modern notion of conservation but it was limited. It could be applied to renewable resources that were exploited, such as forests and fisheries, but it did not apply to protection of ecosystems, habitats and biological diversity outside the context of economic use. The issue was considered to some extent in paragraph 32 of the report and should be further addressed in the commentaries.

She agreed with other members of the Commission regarding the importance of continued application of the principle of permanent sovereignty over natural resources and self-determination in situations of occupation.

The issue of human rights and the protection of the environment was a very important and dynamic area of the intersection of laws. A synergistic relationship between human rights and environmental protection was developing. Many colleagues had gone into detail on the relationship between human rights and the environment, notably citing from the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and the more recent *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* case supporting the continued application of human rights in times of armed conflict and certainly in situations of occupation.

She agreed with the idea, as articulated in many of the statements made, that human rights law provided fertile grounds for extension of its rights to the environment, including the right to food. The relationship between human rights law and the environment was developing into a robust body of laws. As Mr. Grossman Guiloff had said, a recent advisory opinion of the Inter-American Court of Human Rights had recognized the fundamental right to a healthy environment under the American Convention on Human Rights and also the extraterritoriality of application of environmental obligations. She agreed that it was an area that could perhaps be reflected in a separate draft principle expressly focused on human rights and protection of the environment in situations of occupation, especially for prolonged periods of occupation.

The Special Rapporteur had examined the international law of protection of the environment in the situation of occupation. While the Hague Regulations and the Geneva Conventions did not contain express provisions on the obligation of the occupying Power to protect the environment, the principles of the 1992 Rio Declaration on Environment and Development did expressly address the matter. Principle 23 stated clearly that "the environment and natural resources of people under oppression, domination and occupation

shall be protected". She also appreciated Mr. Hassouna's reference to the Global Pact for the Environment.

On the proposed draft principles, she agreed with Mr. Petrič's suggestion regarding an introductory provision that, in all cases of occupation, the existing rules of international law for the protection of the environment should be respected.

Regarding draft principle 19 (1), she agreed with Mr. Hassouna that the language should include a reference to environmental principles and be more closely aligned with the *Iron Rhine ("Ijzeren Rijn") Railway* case, in which the arbitral tribunal had referred specifically to "environmental protection".

Proposed draft principle 19 (2) reflected the traditional approach of article 43 of the Hague Regulations. That "conservationist" approach had been challenged in doctrine and in practice after the occupation of Iraq and the adoption of Security Council resolution 1483 (2003). In her view, the Commission must take into account situations where the laws in force at the time of occupation did not necessarily reflect what was expected of a modern State or good governance, including protection of the environment. She therefore favoured maintaining the term "legislation", which the Special Rapporteur had clearly explained, and supported Mr. Hassouna's proposals to include references to customary international law, local custom and international environmental obligations, the latter also mentioned by Mr. Nolte. If the work of the Commission was to make any contribution to the subject, it must promote a modern set of principles.

Proposed draft principle 20, which was broadly based on the usufructuary rule of article 55 of the Hague Regulations and the notion of good housekeeping, as explained by the Special Rapporteur, or good governance, as described by Professor Bothe, had led to some interesting discussion as to the use of the term "sustainable use", which might lead to allowing the occupying Power to exploit the natural resources of the occupied State to a greater extent than contemplated in the usufructuary rule. The question of sustainable development was not really an issue where an occupation was of short duration; however, if the occupation lasted for an extended period, the rules of international humanitarian law should not create a situation that resulted in stunting the economic development of the occupied State, as might happen with a strict application of the usufruct rule.

Sustainable development and sustainable use were concepts found in many international instruments. Principle 4 of the Rio Declaration on Environment and Development stated that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it". The International Court of Justice, in *Gabčíkovo-Nagymaros*, had explained sustainable development as the need to reconcile economic development with protection of the environment and stated, more significantly, that new norms had to be taken into consideration in treaty interpretation.

She considered that the 2015 adoption by consensus by the General Assembly of Transforming our world: the 2030 Agenda for Sustainable Development and the 17 Sustainable Development Goals had to some degree rendered moot the debate as to whether it was a legal principle or a policy, since sustainable development had been accepted at the highest level of State participation. It would therefore be rather incongruous if the Commission were to appear to be challenging the notion of sustainable development. Furthermore, in the *Iron Rhine* case, the arbitral tribunal had stated that "environmental law and the law of development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm". The tribunal had gone further to state that such a duty, in its opinion, was a general principle of general international law.

The Convention on Biological Diversity provided a definition of "sustainable use", albeit in relation to the components of biological diversity, as their use "in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations". She suggested that the definition should be included in the commentaries and guidance provided.

She further suggested that the term "minimizes", as used in draft principle 20 in the phrase "minimizes environmental harm", should be replaced with "prevents", to reflect the more commonly used terminology of "prevention".

Proposed draft principle 21, which expressed the widely accepted rule of customary international law on prevention and due diligence, should reflect the most recent pronouncements of the International Court of Justice, the International Tribunal for the Law of the Sea and arbitral tribunals. The draft principle should be aligned with those decisions and not the broader language of the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. She also thought there was merit to the suggestion to refer to the due diligence obligations, which could be taken up in the Drafting Committee.

On future work, she agreed on the need to examine the even more challenging questions related to non-international armed conflict and protection of the environment, for which Mr. Cissé had provided a compelling argument, and issues concerning responsibility and liability.

She was pleased to recommend that all three draft principles should be referred to the Drafting Committee.

Ms. Escobar Hernández said that she wished to congratulate the Special Rapporteur on her excellent first report, in which she had set out a detailed and systematic analysis of the topic in relation to situations of occupation. She had based her analysis on a review of the main applicable rules of international law and relevant judicial decisions, as well as on an extensive collection of bibliographical sources. Regrettably, the bibliography annexed to the report focused primarily on publications in English. In future, it would be desirable for such bibliographies, which were very useful to Commission members and scholars alike, to include some of the many, high-quality works that were available in Spanish.

Before turning to her observations on the report, she recalled the need to decide on the title of Part Four of the draft principles and on the titles of the draft principles it contained, and expressed her support for giving preference to the term "occupying Power" over that of "occupying State" for the sake of consistency with the terminology used in international humanitarian law.

She fully endorsed the Special Rapporteur's approach, in which occupation was essentially understood as a situation that arose in the context of and in relation to an international armed conflict and was evidenced by the effective control of all or part of the territory of a State by an enemy Power, and in which the occupying Power provisionally administered the territory, subject at all times to the rules of the law of armed conflict, in particular those specifically applicable to situations of occupation.

That approach was the only one that was relevant for the purposes of the present topic. All other concepts of occupation should, in her view, remain outside the scope of the draft principles, except where they had a connection with international armed conflict. That restricted approach did not in any way detract from the legitimacy of criticisms made of those other forms of occupation — especially colonial occupation — in a general sense.

However, combining them with the issue of military occupation in relation to international armed conflicts was technically untenable from the legal standpoint.

That said, the concept of occupation, as formulated in relation to the current topic, had somewhat evolved in practice, as pointed out by the Special Rapporteur in her report. That evolution must be taken into account when identifying the principles applicable to the protection of the environment in situations of occupation. Those principles could be subject to adjustment in terms of their application, especially in the case of long-term occupations. Despite the many existing types of occupation, it was not necessary to include a definition of each, as had been suggested by some Commission members, or to differentiate between the principles that would be applicable in each case. On the contrary, the very nature of the Commission's current exercise, namely that of identifying principles, required their broad definition. In her view, more detailed explanations of the concept of occupation, the various types of occupation that existed in practice and the possible adaptation of the draft principles to each would best be situated in the commentaries.

During the debate, some Commission members had raised the issue of the international administration of territory by an international organization — citing Kosovo as an example — or under the authority of an international organization — citing Iraq as an example. Although she did not believe that those two situations were equivalent in terms of being considered an "occupation", as understood in the draft principles, it was nevertheless true that the latter of the two could be seen as somewhat similar to an occupation under the law of armed conflict, and the former had at least one feature in common with a situation of occupation, namely, the fact that the mission established by the international organization *de facto* and provisionally administered the occupied territory, exercised the functions typical of a sovereign State and was backed up by military forces. Nevertheless, she had serious doubts as to whether that type of international administration could, strictly speaking, be considered as a situation of occupation, within the meaning ascribed to that concept under the law of armed conflict.

At the same time, she also disagreed with the conclusion reached by one Commission member to the effect that those situations were covered by draft principles 7 and 8 and should therefore not be taken into account in Part Four of the draft principles. On the contrary, draft principles 7 and 8 referred to very specific situations and did not cover all of the activities carried out by missions engaged in the administration of a territory by an international organization. For that reason, it would be useful to include a specific reference to those two situations, or at least to that of a territory placed under the administration of an international organization. That could be accomplished by the insertion of a final draft principle indicating that the principles on the protection of the environment in situations of occupation were applicable, *mutatis mutandis*, to situations concerning the international administration of a territory by an international organization.

That proposal was justified by the fact that such international administration had in any event been defined in practice in relation to armed conflict and that, furthermore, it was impossible to state unequivocally that the rules governing the law of armed conflict and international humanitarian law were not applicable to the integrated forces used in those operations. Developments occurring within the United Nations, especially those related to the Secretary-General's Bulletin on observance by United Nations forces of international humanitarian law (ST/SGV/1999/13), prevented the maintenance of such a radical assertion.

The Special Rapporteur's approach to the topic, which consisted of analysing the interrelationship between the law of armed conflict, international humanitarian law, international human rights law and international environmental law, was correct and fitted perfectly within the framework of the topic under consideration. She fully endorsed the Special Rapporteur's analysis of international human rights law, its relationship to

international humanitarian law and its application in situations of occupation. Her analysis of the extraterritorial effects of the rules of human rights law that must be respected by the occupying Power in an occupied territory was of particular interest. However, it seemed excessively restrictive to focus the study of the applicable human rights law provisions on the right to health. It was, furthermore, not entirely compatible with assertions made in the report itself concerning other rights that might also be relevant in identifying principles for the protection of the environment in situations of occupation, such as the right to life or the right to food, not to mention the right to water, which was the subject of much attention in the United Nations. Moreover, that important analysis of the question of human rights was not expressly recognized in the draft principles, unlike the other areas of international law that the Special Rapporteur analysed in her report.

Turning to the draft principles, she said that she endorsed the general premise underlying draft principle 19, namely that the occupying Power must respect the environment of the occupied territory and take environmental considerations into account in the administration of the territory. In her view, the Special Rapporteur's arguments in support of the premise, which were contained in paragraph 50 of her report, were sound and convincing.

With regard to paragraph 1, she supported the inclusion of the reference to "adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights", since actions associated with the occupying Power's administration of the territory might also take place in those areas or affect the marine environment. However, it would perhaps be preferable to refer in paragraph 1 to maritime areas over which the territorial State "exercises sovereignty or jurisdiction" rather than "is entitled to exercise sovereign rights". Similarly, a reference should be included to the superjacent airspace of the occupied territory, for the same reasons as those applicable to maritime areas. The fact that the Hague Regulations referred to war on land did not appear to be sufficient justification for not including a reference to adjacent maritime areas or to the superjacent airspace in draft principle 19, since, for the purposes of environmental protection, they should be considered as combining with the land surface to form an integral whole.

Unlike some Commission members, she was not opposed to the inclusion in paragraph 2 of the expression "unless absolutely prevented", given the considerations set forth in paragraphs 48 and 49 of the report, but she did find it necessary to include in the commentary a detailed explanation of what was meant by that expression, so as to avoid erroneous or self-interested interpretations according to which the occupying Power could claim the right to modify the legislation of the territorial State. It would also be useful for paragraph 2 to contain a reference to the obligation to respect the rules of international environmental law.

The inclusion of a reference to the relationship between human rights and the protection of the environment was perhaps best placed in draft principle 19. That could be accomplished through the insertion of a new paragraph 3, which would read: "In exercising its competence to administer the territory, the occupying Power shall give special consideration to the need to protect the rights of the civilian population to life, health, food and water, as elements intrinsically related to the protection of the environment." [*En el ejercicio de sus competencias de administración del territorio, la potencia ocupante tomará especialmente en cuenta la necesidad de preservar el derecho de la población civil a la vida, a la salud, a la alimentación y al agua como elementos intrínsecamente relacionados con la protección del medio ambiente.*] That formulation could also be set out in a separate draft principle that would be placed immediately after draft principle 19.

She also supported the general premise underlying draft principle 20. While it was true that the concept of the protection of property in the context of armed conflict did not correlate exactly with that of the protection of natural resources in that context, it was also

true that its evolutive interpretation could be helpful for the purposes of protecting the environment, at least with regard to natural resources. The same applied to the use of the expression "sustainable use" as an evolutive interpretation of the concept of usufruct, which appeared in the Hague Regulations, and especially taking into account the fact that, although usufruct was an autonomous concept, its purpose was essentially to protect an asset that could be used by one subject but must ultimately be transferred to other subjects. For those reasons, she had no serious objections to the use of either "natural resources" or "sustainable use" in draft principle 20.

It was, however, necessary to indicate clearly that the administration by the occupying Power of the occupied territory's natural resources must be conducted on a limited and exceptional basis; that it must be compatible with the occupied territory's permanent sovereignty over the natural resources; and that it must at all times be exercised for the benefit of the civilian population, while safeguarding the interests of future generations. Although it was possible to include those elements in the commentary to draft principle 20, in her view, it was necessary, at a minimum, to explicitly refer to the civilian population as the direct beneficiary of the actions of the occupying Power in administering the natural resources of the occupied territory and to do so in the text of the draft principle.

She agreed with the content of draft principle 21; as the Special Rapporteur had noted, it was clear that the principle of due diligence should be applied.

With regard to the draft principles already adopted by the Commission, she shared the approach taken by the Special Rapporteur in paragraphs 101 to 104 of the report, as amended during the Special Rapporteur's statement, with respect to the relevance of those principles to situations of occupation. The considerations set forth in those paragraphs were of particular interest given the many different forms situations of occupation might take in practice, and they merited special treatment.

In that regard, the Special Rapporteur appeared to suggest that the interrelationship between principles that were relevant to situations of occupation could be resolved through the introduction of changes to the commentaries to draft principles 15, 16, 17 and 18. While that could be a simple and easily implemented solution, it was unclear whether that course of action would be sufficient to embrace the full scope of the problem as described by the Special Rapporteur in those paragraphs. On the contrary, the interrelationship between principles went beyond what was mentioned in paragraph 104; as such, it would be useful to consider other methods that could be used to complement the Special Rapporteur's suggestion. For example, a without prejudice clause could be included in the draft principles relating to situations of occupation, or a general commentary could be drafted in connection with Part Four, which would enable the inclusion of varying perspectives on how the draft principles contained in the other parts of the text applied to situations of occupation.

With regard to the Commission's future work on the topic, she welcomed the Special Rapporteur's proposal to address the protection of the environment in relation to non-international armed conflicts in her second report. There were many serious contemporary examples of that type of conflict and the issue could not be ignored in the draft principles that would eventually be adopted by the Commission.

She also agreed with the proposal to present the complete set of draft principles together with the preamble, with a view to adopting them on first reading in 2019.

Mr. Huang said that he wished to thank the Special Rapporteur for her report, on which he intended first to make some general observations. He had two technical suggestions: firstly, that the Special Rapporteur should adopt the approach of her predecessor, who had included a proposed draft principle immediately following the analysis of it, in order to help the reader understand the analytical process, and then provide

all the proposed draft principles together at the end of the analytical part of the report. Secondly, it would be helpful to suggest titles for the three draft principles she had proposed and any others that were proposed in her next report, in order to maintain consistency with the 18 draft principles that had been provisionally adopted by the Commission or the Drafting Committee.

Given the report's focus on environmental protection in situations of occupation, the concept of occupation and the relevant practices under occupation were particularly significant. The Special Rapporteur had explained the concept of occupation on the basis of the traditional definition in article 42 of the Hague Regulations, citing the explanatory definition in the International Committee of the Red Cross Commentary of 2016 on common article 2 of the Geneva Conventions for the protection of war victims, which appeared to be unproblematic in terms of concepts and, by and large, not too controversial in international jurisprudence. However, the limited number of cases to which the law of occupation was actually applicable had not been fully taken advantage of in the report's argumentation on the issue of occupation and environmental protection. Although the Special Rapporteur recognized that few cases had met the criteria of the Hague Regulations since the founding of the United Nations in 1945, the discussion on specific State practice appeared to avoid intentionally or unintentionally the classic cases of occupation, namely the Occupied Palestinian Territory, the Occupied Syrian Golan Heights and the Occupied Iraqi Territory. The State practice concerning occupations quoted in various parts of the report were mainly not classic cases of occupation. For instance, the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* had repeatedly been cited while the case of the occupation of the Palestinian territory, which had lasted more than five decades, had been cited only indirectly in reference to the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and the practices of the occupying authorities had rarely been touched upon. The same applied to the occupation by the United States of America and its allies in Iraq and Afghanistan and the practices of the United Nations Interim Administration Mission in Kosovo and the Kosovo Force. The result was that, apart from the advisory opinion of the International Court of Justice and the limited number of cases of regional courts of justice, examples of State practice related to occupation seemed to be few and far between in the report.

The second area that required improvement was the lack of differentiation between occupation of different natures, namely between legal and illegal occupation. In the first chapter of the report, entitled "Protection of the environment under the law of occupation", the Special Rapporteur focused on the fact of occupation or being under occupation while the issue of the legitimacy of the occupation had been neglected. All occupations were treated as the same in the discussion, which was, in his view, not appropriate. In the light of the basic principles of the Charter of the United Nations and contemporary international law, no State that occupied the territory of other States by illegal means should be accorded any of the rights, including the right to the exploitation of natural resources, that were enjoyed under legal occupations. As the age-old legal maxim went, *ex dolo malo non oritur actio*. In terms of illegal occupation, the primary requirement of international law was that the occupying Power must end as soon as possible its illegal occupation instead of taking advantage of the natural resources on the occupied territory. As the International Court of Justice had clearly indicated in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, "the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to international law … All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction." The Court further indicated that States should also refrain

from impeding the exercise by the Palestinian people of its right to self-determination. His proposal was to treat differently the two legal statuses of legal and illegal occupation, which were different in nature. The current draft might easily be misread as stating that the occupying Power, in a situation of illegal occupation, was entitled to the rights deriving from legal occupation. The relevant wording should be revised to include at least the words "without prejudice to".

Moreover, the focus on the protection of the environment under occupation in draft principles 19, 20 and 21 seemed to be somewhat misplaced. In his opinion, once the occupation entered its relatively peaceful third stage after the armed conflict, the urgent task for the protection of the environment under occupation was not to respect the existing legislation of the occupied territory relating to environmental protection or exploitation of natural resources, but to act as quickly as possible to eliminate and repair the environmental and ecological damage caused by the war, to eliminate the immediate threat to the environment by the remnants of war, including the removal of the mines laid during the war or unexploded explosives, bullets or other explosive devices, the aftermath of the illegal use of chemical, biological or other toxic weapons and the dismantlement and repair of infrastructure facilities such as reservoirs destroyed or heavily damaged in the war. Those were the primary tasks for the protection of the environment on the occupied territory after the war. The shift of the focus from that most urgent task to the exploitation of natural resources was not in line with the main objective of protection of the environment in armed conflicts and was therefore misplaced. Draft principle 16, on remnants of war, did however make provision for parties to the conflict, after conflict had ended, to seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that were causing or risked causing damage to the environment. Once occupation had begun, the obligations for the parties to the conflict under that article should be transferred in total to the occupying authorities.

His final general comment was that it seemed necessary to include international organizations in the discussion, as a number of members had mentioned previously.

Turning to specific comments on draft principle 19, he said that, insofar as paragraph 1 was concerned, the Special Rapporteur had discussed many aspects that were related to the administration of the occupied territory by the occupying Power, such as property rights, the use of natural resources and the right to health as part of human rights. However, a closer reading would show that those aspects had very little or weak relevance to the protection of the environment. The examples of international treaties, international jurisprudence or national practice cited in the report were focused on other issues.

An example was the law of occupation. Article 55 of the Hague Regulations, which was referred to and cited many times in the report, did not contain a direct provision on protection of the environment. Only through interpretation could a feeble link be established between that article and protection of the environment. Again, the report, when referring to the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), argued that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" constituted a grave violation of the Convention. As a matter of fact, article 55 of the Hague Regulations did not emphasize protection of the environment, but rather focused on the protection of public or private properties in occupied territory, hence it was very difficult to establish a direct logic between "occupation" and "protection of the environment".

The same was true in the area of human rights law. A considerable part of the Special Rapporteur's report was devoted to the right to health. While there were certain interlinkages between the right to health and the environment, it was unclear whether such a right could be protected only or, for that matter, mainly through protection of the environment. If the answer was no, then it would be difficult to establish a solid

relationship between the two. Moreover, protection of the environment might be in conflict with protecting other basic rights of citizens. Of course, the ultimate question remained, namely the linkage between those issues and the situation of occupation.

He therefore agreed with Mr. Park that there might be some skips of logic in the argumentation. While he was not opposed to the conclusion that the occupying Power should take into consideration the element of the environment, the automatic linkage between "occupation" and "protection of environment" remained an unresolved question.

With regard to draft principle 19 (2), he first wished to point out that there might be an error of referencing. In paragraph 44 of her report, the Special Rapporteur cited the opinion of Pictet, who had qualified the occupying State's powers as "very extensive and complex". In fact, that opinion originated from the International Committee of the Red Cross commentary on article 64 of the Fourth Geneva Convention, and not article 47, as referred to in footnote 179 of the report.

Regarding the draft principle itself, the phrase "unless absolutely prevented" constituted the only exception to the occupying Power's obligation to respect the legislation of the occupied territory pertaining to the protection of the environment. The wording in that part was identical to that of the Hague Regulations, except that "the laws in force in the country" had been replaced with "legislation of the occupied territory pertaining to the protection of the environment". As "the laws in force in the country" normally included environmental legislation, he did not therefore object to the Special Rapporteur applying *mutatis mutandis* the relevant provisions of the Hague Regulations to the question of environmental protection. However, the "forward-looking action" mentioned in paragraph 45 of the report created the possibility of breaking the content of draft principle 19 (2) on some grounds and ran the risk of being abused. It should therefore be treated with caution.

Draft principle 20 was primarily on sustainable use of natural resources. The sustainable use of natural resources had recently been of concern to Governments as well as being a hot topic of discussion in the international law community. As the Special Rapporteur stated in her report, a lot of State practice existed in that regard. However, what needed to be examined further was whether those practices possessed the necessary *opinio juris* required by customary international law, or whether they were solely based on policy or economic considerations of a State.

Of the cases mentioned by the Special Rapporteur, none seemed to demonstrate the existence of any treaty, customary international law or general rule of law which contained the notion of "sustainable use of natural resources". The Special Rapporteur, while citing the relevant decisions of the International Court of Justice, at the same time admitted that the Court had not recognized sustainable development as a principle of international environmental law. In the same vein, he had not found any relevant State practice in the report. It appeared that States neither recognized "sustainable use of natural resources" as a binding rule of international law nor did they practise it in reality.

Specifically in situations of occupation, and in relation to the understanding of article 55 of the Hague Regulations, the Special Rapporteur suggested that the notion of "safeguard[ing] the capital of [those] properties" would have to be equated with "sustainable use of natural resources". Such an equation was on rather shaky ground, to say the least.

In view of the foregoing, caution should be exercised when deciding whether and how to put the notion of "sustainable use of natural resources" into the draft principles. As pointed out by the Special Rapporteur in paragraph 97 of her report in relation to sustainable development, "questions nevertheless remain as to its precise content and scope". Moreover, some members had spoken about the necessity for that obligation to be applied only to stable situations of occupation. Some other members had referred to the

question of permanent sovereignty of the State whose territory was occupied over its natural resources. Those views were worth further consideration.

Draft principle 21 dealt primarily with the question of avoiding significant damage to another State or to areas beyond national jurisdiction. The Commission had already deliberated on the topic of transboundary damage, and had adopted the articles on prevention of transboundary harm from hazardous activities, draft articles 1 to 3 of which basically covered the content of draft principle 21, to which he had no objection in principle. However, he wished to seek clarification from the Special Rapporteur on one point, namely the phrase "areas beyond national jurisdiction". It was unclear whether the scope of that phrase covered the high seas, polar areas and outer space. It was his belief that the question needed to be treated cautiously. There should be a proper limitation to the extension and scope of the notion of "areas beyond national jurisdiction".

As for the future work outlined in the report, the Special Rapporteur proposed to address the question of non-international armed conflicts in her next report. He was unsure whether it was necessary to extend the scope of the present topic to non-international armed conflicts, as they were entirely different from international armed conflicts in nature. There were huge differences in the applicable laws and very little State practice in that regard. He hoped that the Special Rapporteur would give that question her careful consideration.

In conclusion, he agreed to sending draft principles 19, 20 and 21 to the Drafting Committee.

Mr. Ruda Santolaria said that he welcomed the Special Rapporteur's excellent first report on protection of the environment, which tied in well with the work that had been done by the previous Special Rapporteur for the topic. The report, which was well documented, contained a broad bibliography and illuminating supporting evidence.

In that respect, the Special Rapporteur's research underscored the fact that occupation encompassed a range of situations reflecting the interrelationship between the law of armed conflict, international human rights law and international environmental law. It also highlighted the absence of established rules regarding the duration of occupation, which in some cases could last many years, even though it had been understood as an intermediate stage between the cessation of hostilities and peace which should not last very long, but in which the fundamental element was, as set forth in article 42 of the Hague Regulations of 1907, the *de facto* control exercised by the armed forces of a State over part or all of the territory of another State, which included adjacent maritime areas and superjacent airspace. In that scenario, authority was rooted not in transferral of sovereignty, which had not occurred, but in effective *de facto* control. "Indirect occupation" was also possible, insofar as a foreign Power operated through local *de facto* agents or bodies. The definition was based on the concept of belligerent occupation, although it now included other cases in which the forces of one or several States temporarily exercised their authority over a territory located outside the internationally recognized borders of that State.

He agreed with the Special Rapporteur that the application of human rights law to situations of occupation depended on the prevailing circumstances, such as the nature of the occupation — calm or volatile — and its duration; at the same time, it was, in many ways, conditioned by the law of occupation as *lex specialis*. Many aspects of human rights law and the environment were linked, particularly in the sphere of economic, social and cultural rights, such as the rights to water, food, health and life.

One particularly important aspect in the approach adopted by the Special Rapporteur was the meaning of property rights and guarantees thereof in the context of occupation with regard to protection of the environment. That relationship had been highlighted in the jurisprudence of the Inter-American Court of Human Rights, particularly in relation to indigenous peoples' land.

Some of the specific provisions on property rights established by the law of occupation were considered to apply to natural resources conceived as "property within the occupied territory".

In that sense, as set forth in article 55 of the 1907 Hague Regulations and as explained by the Special Rapporteur, the occupying State administered the natural resources situated in the occupied territory through the "usufructuary rule", which concerned the limitations to the occupying State's use of public property in the occupied territory. The occupying State must utilize natural resources only to the extent of military necessity, the principle of permanent sovereignty over natural resources being customary in nature in accordance with the jurisprudence of the International Court of Justice. In line with the foregoing, the occupying State must not act in a wasteful way and, from a more contemporary perspective, must avoid overuse and pollution. In that connection, it seemed appropriate to invoke self-determination with regard to the exploitation of natural resources in occupied territories, particularly in the case of territories which were not part of any established State. It was also appropriate to stress the utilization and protection of water resources in relation to situations of occupation; the occupying State had the duty to protect the water resources so that their quantity or quality was not seriously impaired.

He also agreed with the Special Rapporteur that a further limitation that provided protection to natural resources and other components of the environment was contained in the general prohibition on destruction or seizure of property, whether public or private, movable or immovable, in the occupied territory unless such destruction or seizure was rendered absolutely necessary by military operations.

On the other hand, the competences of the occupying State were also curtailed by the duty to restore and maintain public order and civil life in the occupied territory. Article 64 of the Fourth Geneva Convention of 1949 made provision for the occupying State to legislate when necessary for the maintenance of public order and civil life and to change legislation that was contrary to established human rights standards.

In the same vein, although the conservationist principle must be preserved in terms of maintaining the *status quo* that had existed prior to the occupation, in combining the application of article 43 of the Hague Regulations with article 64 of the Fourth Geneva Convention, it was fundamental to appreciate that "civil life" and "orderly government" were evolving concepts. As the Special Rapporteur had pointed out, the longer an occupation lasted, the more evident the need for some changes so as to avoid stagnation and to allow the occupying State to fulfil its duties under the law of occupation. The foregoing did not imply acceptance of the controversial concept of "transformative occupation", given that, although the occupying State had to take into account certain considerations, such as public order, civil life and welfare in the occupied territory, it could not introduce permanent changes in fundamental institutions of the occupied territory. The occupying State in turn had a general obligation to respect the environment in the occupied territory and to take environmental considerations into account in the administration of the territory.

The occupying State was expected to administer the occupied territory for the benefit of the occupied population. Based on article 43 of the 1907 Hague Regulations, the Special Rapporteur stressed that the occupying State had a general obligation to respect the environment in the occupied territory and to take environmental considerations into account in the administration of such territory. He agreed both with that assertion and with the assertion that that obligation also found support in key human rights such as the rights to food, water and life, which were closely linked to the protection of the quality of the soil and water, and even biodiversity, to ensure viable and healthy ecosystems.

In addition, as featured in the Special Rapporteur's report, it was also worth stressing the relationship between international humanitarian law and human rights law,

insofar as some rights might be matters of one or the other branch of international law or of both branches. It was also worth emphasizing that, according to international jurisprudence, human rights instruments to which the occupying State was a party continued to apply with respect to acts committed in occupied territories. In the same vein, it was worth highlighting the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which the Court had confirmed the applicability in the Occupied Palestinian Territory of the International Covenant on Civil and Political Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. The Court had also highlighted, in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, that international human rights instruments were applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.

Human rights law, as noted by the Special Rapporteur, might provide specifications for the interpretation of the notion of "civil life" or a more exact formulation of the obligations of States with regard to ensuring "public health". It was feasible to affirm the complementarity of both sets of rules, while recalling that the law of occupation continued to provide the general framework for the occupying State's action and that the responsibilities falling on the occupying State were commensurate with the duration of the occupation.

He agreed with the Special Rapporteur that environmental degradation might be linked to the violation of several human rights, such as the right to life, right to private and family life, right to health or right to food. As the Inter-American Court of Human Rights had concluded in Advisory Opinion OC-23/17 of 15 November 2017, on environment and human rights, the right to a healthy environment was a fundamental human right.

In addition, in line with article 56 of the Fourth Geneva Convention of 1949, the occupying State had the duty of ensuring public health in the occupied territory, focusing not only on the aftermath of the cessation of hostilities and combating the spread of contagious diseases and epidemics, but also on longer-term public health issues.

The advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* undoubtedly provided important support to the claim that international environmental law continued to apply in situations of armed conflict. On that basis, as the Special Rapporteur stated in her report, international environmental law, both customary and conventional, continued to play a certain role in situations of occupation.

At the same time, the responsibility not to cause damage to the environment fell under customary international environmental law. The principle of "due diligence" was key in terms of the responsibility not to cause damage to the environment of other States or to areas beyond national jurisdiction. There was no doubt that it applied to occupying States in occupied territories under their control or *de facto* jurisdiction and that they were required to prevent significant transboundary harm. That assertion was supported by the advisory opinion of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, by virtue of which physical control of a territory, and not sovereignty or legitimacy of title, was the basis of State liability for acts affecting other States, and by the Commission's draft articles on prevention of transboundary damage from hazardous activities, according to which that obligation applied to activities carried out within the territory or otherwise under the jurisdiction or control of a State.

The occupying State must therefore observe the no harm or due diligence principle so as to prevent serious transboundary harm to the environment of third States. In that

regard, he agreed with the emphasis the Special Rapporteur had placed on the fact that the occupying State, on a temporary basis, became subject to the rights and obligations regarding watercourses, lakes, maritime areas or other transboundary water resources, which included the obligation not to cause significant harm to the environment of other States or areas beyond national jurisdiction.

A reading of article 55 of the Hague Regulations of 1907, on the exploitation of the natural resources of the occupied territory by the occupying State, supported the assertion that the rules of usufruct prohibited predatory exploitation that would put a significant stress on the environment. In that regard, the sustainable use of natural resources in the occupied territories must be kept in mind; that concept should be understood as combining exploitation interests with environmental and social concerns.

He was of the view that it would have been preferable to place each of the proposed draft principles next to the relevant text supporting it. Doing so would not prevent them being included as a whole at the end of the report.

Like other members who had already taken the floor, he was of the opinion that draft principle 19 ought to specify the human rights obligations of the occupying State for the benefit of the population of the occupied territories, in particular the right to health, which, as the Special Rapporteur explained, had significant implications for environmental protection in those territories.

In the light of the foregoing, he agreed that the draft principles proposed by the Special Rapporteur should be sent to the Drafting Committee. He also agreed with the proposal that the second report should address non-international armed conflicts; he hoped that the Commission would be able to complete its first reading of the topic in 2019.

Mr. Ouazzani Chahdi, after thanking the Special Rapporteur for her well-researched report, said that he wished to make a few general observations before commenting on the draft articles and other questions addressed by her at the end of the report.

Her approach to the topic, which took account of new trends in international law while drawing from a number of complementary areas of law, including the law of occupation, the law of armed conflict, environmental international law and human rights international law, was commendable. That said, the direct impact of such types of international law on the environment was not always clear. That was perhaps due to the fact that the environment had not been an issue for discussion at the time of the drafting of the Hague Regulations of 1907. It was not until the adoption of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I) that provisions on the protection of the environment during armed conflict had been enacted, specifically in article 55 of the Protocol. The issue was further complicated by the fact that most environmental treaties did not contain express provisions on their applicability in case of armed conflict.

Another issue he wished to address concerned the need to define and clarify some of the concepts referred to in the report. For example, the concept of "occupation" should be made more precise in order to avoid situations that did not fall into the category of an armed occupation, as defined in article 42 of the Hague Regulations and supplemented by the Commentary of 2016 of the International Committee of the Red Cross on article 2 common to the four Geneva Conventions relating to the protection of victims of international armed conflicts (Geneva Conventions of 1949). Likewise, clarification of the concepts of "calm occupation" and "volatile occupation" would be appreciated, as would an elucidation of "transformative occupation". The term "armed conflict" might also have been more specifically defined. Even though "armed conflict" and "environment" had been defined provisionally in the preliminary report of the former Special Rapporteur

(A/CN.4/674), it might have been useful to include the definition of "armed conflict" in the current Special Rapporteur's report, by referring, for instance, to article 2 of the draft articles on the effects of armed conflicts on treaties and to the commentaries thereto. The notion of "occupying Power" also warranted further clarification. In its judgment in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the International Court of Justice had set out the criteria used to reach its conclusion that Uganda was the occupying Power in the meaning of the term as understood in the *jus in bello* in Ituri district at the relevant time and that as such it was under an obligation, according to article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the Democratic Republic of the Congo.

It was clear that the competence of the occupying State with regard to property rights was very limited. In referring to article 55 of the Hague Regulations of 1907, which laid down the so-called "usufructuary rule", and article 53 of the Hague Regulations, which set out other limitations in respect of the occupying State, the Special Rapporteur rightly concluded, in her report, that the latter article made no mention of natural resources, but could be seen to cover crude oil that was extracted from the soil. During the Second World War, courts had ruled that an occupying State did not have the right to exploit crude oil since oil was not a "munition of war" within the meaning of article 53 of the Hague Regulations. The Special Rapporteur also cited the Singapore Oil Stocks case, as supporting the position that underground crude oil was immovable property. The issue of oil exploitation had arisen during the Israeli-Arab conflict with regard to the exploitation by Israel of the oil fields located in Sinai and the Gulf of Suez.

He supported the proposals made by the Special Rapporteur concerning the "conservationist principle", but had some reservations about how the phrase "unless absolutely prevented" and the word "essential" contained in article 43 of the Hague Regulations and in article 64 of Fourth Geneva Convention, respectively, had been interpreted — namely, to allow the occupying State the competence to legislate in certain situations.

Chapter II of the report on protection of the environment in situations of occupation through international human rights law was a useful contribution, in that it explained the complementarity between the law of occupation and international human rights law and the interrelationship between the protection of the environment and human rights. Like other members of the Commission, however, he wondered whether too much of the report focused on the right to health, leaving too little room for the right to life, which received only a brief mention in paragraph 64, whereas article 55 of Additional Protocol I mentioned not only "the health" but also "the survival" of the population. The right to food and the right to water, which were enshrined in legal texts such as the 2014 Constitution of Tunisia, were also essential and warranted a separate mention.

Turning to the draft principles themselves, he said that, like the previous draft principles under the current topic, they should be given headings. It might also be advisable to formulate a principle on the responsibility of the occupying State. He supported the inclusion of a reference to the sovereign rights that a territorial State was entitled to exercise over any adjacent maritime areas was problematic, as maritime areas were an integral part of a State's territory. He supported the proposal that the phrase "unless absolutely prevented" should be clarified in the commentary to the draft principles. As for the bibliography, which was useful overall, he suggested that, in future, scholarly writings should be identified separately for even easier perusal. Lastly, the Commission should take a cautious approach in its future work on the topic, so as to further explore the concept of non-international armed conflict without politicizing it.

In conclusion, he recommended referring the draft principles proposed by the Special Rapporteur to the Drafting Committee.

The Chair, speaking as a member of the Commission, said that, as had been the case with previous reports on the topic, the Special Rapporteur's first report went beyond the considerations related to the protection of the environment in relation to armed conflict.

The fact that the report pointed to a number of relevant norms that allowed for a dynamic interpretation of the law of occupation made it possible to overcome the fact that rules of occupation law had been developed prior to the regime on the protection of the environment. Nevertheless, the relevance of such an approach should be explained. He agreed with the decision to group together the draft principles that specifically referred to situations of occupation in Part Four of the outcome, which might be entitled "Principles applicable to situations of occupation", as had been suggested by several colleagues.

Although, as noted by the Special Rapporteur in paragraph 24 of her report, the Commission had not yet decided whether there was a need to address the use of terms in the context of the draft principle, he was of the view that, for greater legal precision, the Commission should include a definition of the concept of occupation, as proposed by the Special Rapporteur in paragraphs 19 to 23, which reproduced the definition given by the International Committee of the Red Cross. In that regard, in the commentary to draft article 2 on the effects of armed conflicts on treaties, the Commission stated that it considered it desirable to include in the definition of armed conflict situations involving a state of armed conflict in the absence of armed actions between the parties. Thus, the definition included the occupation of territory which met with no armed resistance. In her report, the Special Rapporteur did not address the difference between belligerent occupation and non-belligerent occupation and its potential impact on the regime of protection of the environment in relation to armed conflicts; such a point warranted further analysis.

With regard to the regime of occupation, the Special Rapporteur had expertly explained the tension and overlap between the conservationist principle and the obligation to guarantee public order and normal life in an occupied territory. Nevertheless, it would be useful for the Special Rapporteur to elaborate on the interaction between the two, with particular emphasis on the protection of the environment and on the tools and considerations that should be taken into account with a view to resolving potential conflicts.

Although the Special Rapporteur, in her report, laid out the potential impact of the particular qualification of a natural resource under municipal law in determining the protection afforded it by the 1907 Hague Regulations, she did not express an opinion on whether such a qualification could result in a lack of protection for natural resources that warranted protection under standards of international law. Nor did she mention any tools that might provide a solution in situations where protection was lacking. Furthermore, the Special Rapporteur reviewed the exceptions to protection of immovable private property on the basis of military necessity, but did not explain her understanding of the concept of "military necessity".

He welcomed the inclusion of environmental considerations as an operative element to be taken into account by the occupying Power with a view to safeguarding the capital of natural resources. Noting that the Special Rapporteur's report made only a tangential reference to the concept of transformative occupation, he wondered if it might be helpful to elaborate on that concept, to the extent that doing so might clarify the content and scope of the obligations of the occupying Power in respect of the protection of the environment.

The section on the protection of the environment through human rights law as a complementary regime was useful. In addition to the indirect protection of the environment through the right to health, it might be advisable to include other tangential forms of protection through other types of rights, such as the right to life, from the viewpoint of

international humanitarian law, or the right to work, as had been suggested by other colleagues. It would be further useful to carry out a more in-depth analysis of the interaction between the potentially applicable legal regimes and to determine the scope of those interactions, since the various regimes could alter the standards of others, within the framework of the current topic.

As he had pointed out in the past, the Commission's work on the topic appeared to focus on the natural environment without any consideration being given to the natural environment's pecuniary value or usefulness to humans. Reports by the United Nations Environment Programme dating back to 2009 had drawn attention to the intrinsic value of natural resources that were in some way useful or had some value for mankind. Although the Special Rapporteur's report included new perspectives, it was important to maintain a comprehensive view of the topic that encompassed all aspects of the environment.

He welcomed the Special Rapporteur's analysis of the obligations of the occupying Power in respect not only of the protection of the environment of the occupied territory, but also of the transboundary responsibility it carried in relation to other States. Nevertheless, the Commission should consider the possibility of natural resources' being under the control of both the occupying Power and the occupied State. In particular, the Commission should examine situations that necessitated cooperation between the occupying and occupied States, for instance, to determine the environmental impact or to jointly administer the natural resource in question.

While in the report was explained the functional approach to the law of occupation, which allowed for a gradual application of the latter, it was not made explicit how that might affect the protection of the environment in relation to armed conflicts, how the applicable regimes interacted or which obligations or principles might be relevant in seeking solutions. It was particularly important to analyse the impact of the time and duration of the occupation on the obligations of the occupying Power, since the law of occupation was dynamic and its content could vary depending on the duration of the occupation and, thus, alter the obligations of the occupying Power.

A temporal approach to the topic was not necessarily the best approach, as it could lead to artificial divisions, upon which, as discussed in the Special Rapporteur's report, the applicable law would depend. That was particularly true with regard to the law of occupation: occupation could occur in any of the phases — before, during or after an armed conflict. As a result, the Special Rapporteur's attempt to link her study of the law of occupation with the law of armed conflict — the most general of the legal regimes — created a certain tension with regard to the application of the concepts, as the Special Rapporteur herself had pointed out. From the report it was not clear whether a different standard for the protection of the environment existed for occupations that took place during, before or after an armed conflict, nor was the reasoning behind such a potential differentiation clear. Likewise, despite stating that the limitations on the law of occupation become increasingly apparent the longer an occupation lasted, the Special Rapporteur did not indicate whether there were standards or legal tools for dealing with such limitations.

The fact that the Special Rapporteur had identified four (draft principles 15, 16, 17 and 18) of the five draft principles in Part Three as requiring clarification with regard to their relationship to situations of occupation raised doubts as to whether the legal technique being used was the most appropriate. Those concerns notwithstanding, the identification of such draft principles was useful and he supported their clarification in the relevant commentary. Furthermore, the Special Rapporteur should explain why she had identified draft principle 6, pertaining to Part One, as requiring clarification, while at the same time claiming that the relevance of the draft principles in Part One to situations of occupation "did not seem to be in doubt".

It was important to analyse the consequences of clarifying the applicability of certain draft principles to situations of occupation and of not clarifying others; that was relevant particularly to draft principle 14, but also to all those in Parts One and Two. Such a consideration was important even for those draft principles included in the potential Part Four, specifically relating to situations of occupation. He supported the proposal to include a *mutatis mutandis* clause with regard to the rest of the draft principles.

As for the new draft principles proposed in the report, he supported the Special Rapporteur's suggestion to replace the passive voice with the active voice in draft principle 19. He agreed with other members of the Commission that the latter half of paragraph 1 of draft principle 19 was unnecessary and that adjacent maritime areas could be dealt with in the commentary to the draft principle in question. In that regard, he understood that, according to the judgment of the International Court of Justice in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the inclusion of such areas in the occupied territory was based on a factual assessment of effective control over such areas. Nevertheless, it would be necessary to clarify, in the commentary, the environmental considerations to be taken into account, which could include a study on the existence of procedural rights related to the protection of the environment as part of future work.

He further pointed out that, in the Spanish text of draft principle 19 (1), the words "*en la administración del territorio ocupado*" should be replaced with "*de la administración del territorio ocupado*"; otherwise, the reference to "*las consideraciones ambientales*" should be made explicit. It would not be superfluous to include, in the commentary to draft principle 19, the resources-related constraints imposed on the occupying Power and the need to cooperate for the purpose of rebuilding environmental governance institutions in the domestic administration of the occupied territory.

He welcomed the alignment of the wording of draft principle 19 (2) with that of article 43 of the 1907 Hague Regulations in respect of the phrase "unless absolutely prevented", while noting that it would be important to elaborate on the concept behind the phrase in the commentary to draft principle 19.

As to whether the term "occupying Power" should apply to States alone or whether it could be extended to apply to international organizations, it was necessary to determine whether an international organization had the necessary competence according to its statute and whether it was actually capable of establishing and exercising control over the territory in question, in accordance with article 42 of the Hague Regulations. Lastly, as other Commission members had already mentioned, the term "sustainable use" in draft principle 20 should be explained.

With regard to draft principle 21, the replacement of the phrase "the measures at its disposal" with "the means in [its] power", in line with article 43 of the Hague Regulations, would confer the appropriate level of responsibility on the occupying Power. In addition, the commentary to draft principle 21 might include a reference to coordination and cooperation in the administration of both transboundary natural resources and natural resources subject to the jurisdiction of the occupying and occupied Powers.

With regard to the Commission's future work on the topic, he proposed, with a view to comprehensiveness, that the Special Rapporteur should review the settlement of disputes that arose relating to the effects on the environment of armed conflicts and relevant mechanisms. He furthermore supported the proposal that future work on the topic should involve examining how the temporal approach adopted by the Commission could be applied to situations of occupation.

In conclusion, he was in favour of referring all the draft principles proposed by the Special Rapporteur to the Drafting Committee, taking into account the comments made in the debate.

The meeting rose at 12.40 p.m.